Peguam Negara Malaysia v Dr Micheal Jeyakumar Devaraj

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01–215 OF 2011
LOW HOP BING, ABDUL WAHAB PATAIL AND ANANTHAM KASINATHER JJCA
10 OCTOBER 2011

Administrative Law — Judicial review — Application for leave granted — Appeal against — Review of decision of appellant to approve and disburse funds — Whether trial judge erred in granting respondent's application — Writ of quo warranto — Whether writ was correct relief — Certiorari and mandamus — Whether appellants under legal duty to approve respondent's application — Whether application required appellants to exercise discretion — Whether reliefs sought by respondent involved policy considerations and management prerogative — Whether reliefs sought were non-reviewable and non-justiciable — Rules of the High Court 1980 O 53 — Specific Relief Act 1950 s 44

The respondent, a Member of Parliament for Sungai Siput, made an application for the allocation of funds from the Federal Consolidated Funds, which are allocated for all parliamentary constituencies ('the allocation'), to fund certain projects for the constituency of Sungai Siput for the year 2010 ('the 2010 application'). The Director of the Perak State Development Office ('the director') informed the respondent that as of 25 July 2010, it had already approved a total of 56 projects valued at RM1.72m for Sungai Siput, while other applications would be given due consideration. At the same time the director gave the respondent practical suggestions to channel relevant applications to relevant government agencies. Dissatisfied with this decision, the respondent applied by way of notice of motion under O 53 of the Rules of the High Court 1980 for leave for judicial review of the director's decision. The respondent's motion sought, inter alia, a writ of *quo warranto* against the director, the Director General of the Implementation and Co-ordination Unit of the PM's Department ('the DG') and the Government of Malaysia (the appellants); an order of mandamus to compel the appellants to disclose information in respect of the projects for which the allocation will be granted for the Sungai Siput constituency; and an order of mandamus to compel the director to grant the 2010 application. The High Court judge granted the respondent's leave application and hence the present appeal.

Held, allowing the appeal with no order as to costs in this court and court below:

(1) A writ of quo warranto, a prerogative writ to challenge the appointment

of a person to hold public office, required the court to determine whether that person was legally qualified to hold public office and to discharge his functions. However, in the instant appeal, it was abundantly clear that the writ of quo warranto which the respondent sought was directed to all the appellants to show cause and give information as to their authority to exercise the discretion to approve and disburse funds from the allocation. Further the averments in the respondent's affidavit plainly and obviously showed that the respondent was not challenging the qualifications and appointments of the director and/or the DG but the lack of transparency and certainty as well as inconsistencies relating to the allocation. As such, based on the factual background this writ was not the correct relief (see paras 13–19).

(2) Before the court made an order of mandamus under s 44 of the Specific Relief Act 1950, the respondent had to show, inter alia, that there was a legal or statutory duty on the part of the DG and/or the director as a matter of course to approve the respondent's 2010 application. The respondent had failed to do so. In the instant appeal, it was clear that the director and/or the DG would not approve all applications to approve and disburse funds from the allocation but would consider each application in accordance with the guidelines for that purpose. Thus, the approval and disbursement applications involved an exercise of discretion, which could only be decided by the DG and/or the director in line with policy considerations and management prerogative (see paras 27–31).

(3) Our courts do not possess the knowledge of policy considerations that underlie the decisions pursuant to the DG and/or the director's evaluation. As the issues raised in the notice of motion in the instant appeal were issues of policy considerations and management prerogative they were not amenable to judicial review and hence not justiciable (see paras 34–37).

[Bahasa Malaysia summary

Responden, seorang Ahli Parlimen bagi Sungai Siput, membuat permohonan untuk peruntukan dana daripada Dana Bersatu Persekutuan, yang diperuntukkan untuk semua kawasan parlimen ('peruntukan tersebut'), untuk membiayai projek-projek tertentu untuk kawasan Sungai Siput bagi tahun 2010 ('permohonan 2010'). Pengarah Pejabat Pembangunan Negeri Perak ('pengarah') memberitahu responden bahawa setakat 25 Julai 2010, ia telah meluluskan sejumlah 56 projek bernilai RM1.72 juta bagi Sungai Siput, sementara permohonan-permohonan lain akan diberikan pertimbangan yang sewajarnya. Pada masa yang sama pengarah memberikan responden cadangan yang praktikal untuk menghantar permohonan yang relevan kepada agensi kerajaan yang relevan. Tidak berpuas hati dengan keputusan ini, responden memohon melalui notis usul di bawah A 53 Kaedah-Kaedah Mahkamah

Tinggi 1980 untuk kebenaran semakan kehakiman terhadap keputusan pengarah tersebut. Usul responden memohon, antara lain, writ *quo warranto* terhadap pengarah tersebut, Pengarah Am, Unit Koordinasi Implementasi Jabatan Perdana Menteri ('PA') dan Kerajaan Malaysia (perayu-perayu'); satu perintah mandamus untuk mendesak perayu-perayu mendedahkan maklumat berkaitan dengan projek-projek untuk mana peruntukan tersebut akan diberikan kepada kawasan Sungai Siput; dan satu perintah mandamus untuk mendesak pengarah tersebut membenarkan permohonan 2010. Hakim Mahkamah Tinggi membenarkan permohonan kebenaran responden dan maka rayuan ini.

Diputuskan, membenarkan rayuan tanpa perintah untuk kes di mahkamah ini dan Mahkamah Tinggi:

(1) Writ quo warranto, writ prerogatif untuk mencabar pelantikan seseorang memegang jawatan umum, memerlukan mahkamah untuk menentukan sama ada orang tersebut layak dari segi undang-undang untuk memegang jawatan umum dan menjalankan tugasnya. Walau bagaimanapun, di dalam rayuan ini, amat jelas bahawa writ quo warranto yang dipohon oleh responden diarahkan kepada kesemua perayu untuk menunjukkan sebab dan memberikan maklumat berkenaan dengan kuasa untuk melaksanakan budi bicara untuk meluluskan dan memberikan dana daripada peruntukan tersebut. Selanjutnya penyataan-penyataan di dalam afidavit responden jelas menunjukkan bahawa responden tidak mencabar kelayakan dan pelantikan pengarah tersebut dan/atau PA tetapi kekurangan transparensi dan kepastian dan juga ketidakkonsistenan berkaitan dengan peruntukan tersebut. Dengan itu, berdasarkan kepada latar belakang fakta, writ ini bukan relief yang betul (lihat perenggan 13–19).

(2) Sebelum mahkamah membuat perintah mandamus di bawah s 44 Akta Relief Spesifik 1950, responden perlu menunjukkan bahawa, antara lain, terdapat kewajipan dari segi undang-undang atau statutori pada pihak PA dan atau pengarah tersebut dalam keadaan tersebut untuk meluluskan permohonan 2010 responden. Responden gagal berbuat demikian. Di dalam rayuan ini, jelas bahawa pengarah tersebut dan/atau DG tidak akan meluluskan kesemua permohonan untuk meluluskan dan memberikan dana daripada peruntukan tersebut tetapi akan mempertimbangkan setiap permohonan menurut panduan untuk tujuan tersebut. Oleh demikian, kelulusan dan pemberian permohonan melibatkan pelaksanaan budi bicara, yang hanya boleh diputuskan oleh PA dan/atau pengarah tersebut selari dengan pertimbangan polisi dan prerogatif pengurusan (lihat perenggan 27–31).

(3) Mahkamah kita tidak mempunyai pengetahuan pertimbangan polisi yang menjadi dasar keputusan berkaitan dengan PA dan/atau penilaian

pengarah tersebut. Oleh sebab isu yang dibangkitkan di dalam notis usul di dalam rayuan ini adalah isu pertimbangan polisi dan pengurusan prerogatif ia tidak boleh disemak secara kehakiman dan dengan itu tidak boleh diadili (lihat perenggan 34–37).]

Notes

For cases on judicial review in general, see 1(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 249–308.

Cases referred to

Council of Civil Service Unions v Minister for Civil Service [1994] 3 All ER 935, HL (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1997] 1 MLJ 481; [1997] 1 CLJ 665, CA (refd)

Koon Hoi Chow v Pretam Singh [1972] 1 MLJ 180, HC (refd)

Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh [1997] 1 MLJ 789, SC (refd)

R Rama Chandran v The Industrial Court of Malaysia Anor [1997] 1 MLJ 145, SC (refd)

Legislation referred to

Courts of Judicature Act 1964 Schedule, para 1
Federal Constitution art 8(1)
Rules of the High Court 1980 O 53
Specific Relief Act 1950 ss 44, 44(1), 49

Appeal from: Application for Judicial Review No–25–474 of 2010 (High Court, Kuala Lumpur)

Suzana Atan (Narkunavathy Sundareson with her) (Senior Federal Counsel, Attorney General's Chambers) for the appellant.

Ambiga Sreenevasan (Mahaletchumi Balakrishnan with her) (Sreenevasan) for the respondent.

Low Hop Bing JCA (delivering judgment of the court):

APPEAL

[1] This is the attorney general's appeal against the decision of the learned High Court judge who had on 25 February 2011 allowed the respondent's application by way of notice of motion ('the notice of motion') for leave for judicial review under O 53 of the Rules of the High Court 1980 ('O 53').

NOTICE OF MOTION

[2] In essence, the notice of motion sought the following reliefs:

(a) a writ of *quo warranto* against the appellants, viz the Director General of

A the Implementation and Coordination Unit of the Prime Minister's Department ('the DG'), the Director of the Perak State Development Office ('the director') and the Government of Malaysia, to show cause and give information as to their authority to exercise, vest and/or delegate *the discretion to approve and disburse funds* from the Federal Consolidated B Funds which are allocated in the Federal Budget 2010 and any annual Federal Budget to the Prime Minister's Department for all parliamentary constituencies ('the allocation') and to explain their respective roles and relationship in relation to one another;

C (b) orders of mandamus to compel the appellants to specify information in respect of the disbursement of the allocation, in particular for the Sungai Siput Parliamentary Constituency ('Sungai Siput');

(c) declarations that, in accordance with art 8(1) of the Federal Constitution (art 8(1)), the allocation must be provided and made available to all D Members of Parliament equally regardless of political affiliations and that the director's decision in the letter dated 12 October 2010 is a breach of art 8(1) and therefore unconstitutional and void;

(d) an order of certiorari to quash the director's decision in the letter dated 12 October 2010 and consequently an order of mandamus to compel the dg E and/or the director to grant the respondent's application vide letter dated 9 July 2010 for funds from the allocation for Sungai Siput for the year 2010 ('the 2010 application'); and

(e) damages and costs. F

FACTUAL BACKGROUND

[3] A narrative of the factual background serves to put this appeal in proper perspective. There is a time-honoured saying that when the facts are clearly and G accurately established, the law will take care of itself.

[4] The respondent is the Member of Parliament for Sungai Siput.

H **[5]** The respondent made an application for funds under the allocation in 2010.

[6] The director vide letter dated 26 July 2010 informed the respondent that:

I (a) As of 25 July 2010, 56 projects valued at RM1.72m had been approved for Sungai Siput, nine of which valued at RM1.15m were being implemented, while 47 projects valued at RM561,865.15 had been completed.

(b) The respondent's application for RM50,000 for victims of natural

disasters, to be deposited in the land office, cannot be considered because there was no allocation for that purpose. It was suggested that the respondent submit the list of victims concerned together with police report for consideration, so that there would be no overlapping with contributions from other government agencies.

(c) Regarding the respondent's proposal for funding the relevant Parent-Teachers' Associations ('PTAs') and other bodies, the respondent was requested to submit a list of the names of the PTAs and particulars of bank accounts for consideration.

[7] Vide letter dated 24 August 2010, the respondent provided the details requested by the director and sought the director's clarification about the approved projects.

[8] Subsequently, the respondent, vide letter dated 8 October 2010, informed the director that if by 15 October 2010, he (the respondent) did not receive any reply to his letter dated 24 August 2010, he would assume that his 2010 application was rejected.

[9] The director vide letter dated 12 October 2010 informed the respondent that:

(a) As of 25 July 2010, a total of 56 projects valued at RM1.72m had been approved for Sungai Siput. The amount covers contributions, supplies and projects;

(b) the contributions include grants to organisations and societies such as the SMJK Shing Chung (National Type Secondary School) PTA, Methodist School PTA and Nurul Ihsan Orphanage, as stated in the respondent's letter. In addition, the schools of the Orang Asli Community such as Pos Piah National School, Pos Perwor National School and other Orang Asli communities also benefit from the above contributions;

(c) in view of the limited allocations, the aforesaid recipients of the contributions will not be further considered, while others will be assessed on the basis of need; and

(d) For minor projects in the Orang Asli areas, the respondent was advised to submit the applications to the Orang Asli Department.

[10] On the basis of the above factual background, we shall now consider the questions of law raised in the notice of motion.

WRIT OF QUO WARRANTO

[11] Senior federal counsel Ms Suzana Atan (Ms Narkunavathy Sundareson

with her) objected to the respondent's application for leave for a writ of *quo warranto*. They argued that the notice of motion had never challenged the qualifications of the DG and/or the director to hold public office. There was also no allegation of any flaw in their appointments.

[12] The respondent's learned counsel Dato' Ambiga Sreenevasan (Ms Mahaletchumi Balakrishnan with her) did not refer to the writ of *quo warranto* sought in prayer (1) of the notice of motion. Instead, they relied on paras 17–19 of the respondent's affidavit, purportedly to challenge the qualifications of the DG and the director to hold office, on the alleged grounds of conflicting statements as to their respective power and authority, and the lack of certainty and inconsistencies as to who holds the power and authority in respect of disbursing the allocation.

[13] In our view, the question of law which arises for our determination under this head is:

> Having regard to the aforesaid factual background, more specifically prayer(1) in the notice of motion seeking a writ of quo warranto, and paras 17–19 of the respondent's affidavit, is a writ of quo warranto the correct relief?

[14] We begin by stating that 'Quo Warranto' is a latin term. Briefly, it means 'By what warrant or authority' an office is held. It is a prerogative writ to challenge the appointment of a person to hold public office, on the ground that he is not qualified to do so or that there was a legal flaw in his appointment. That relief calls for the court to determine whether that person is entitled to hold the public office and to discharge his functions.

[15] In order to succeed in an application for a writ of *quo warranto*, the respondent must satisfy three preconditions:

(1) The office in question has been created by written law;

(2) the office is a public office; and

(3) *the person proceeded against is not legally or properly qualified to hold the office.*

[16] Preconditions (1) and (2) above are not at issue and do not need elaboration. However, precondition three requires further discussion here.

[16] In the instant appeal, it is abundantly clear to us that the writ of *quo warranto* which the respondent sought was directed to all the appellants 'to show cause and give information as to their authority to exercise, vest or

delegate the *discretion to approve and disburse funds from the Allocation* and to explain their respective roles and relationship in relation to one another'.

[17] As a matter of fact, in his capacity as Member of Parliament, the respondent had already sought and obtained in Parliament the relevant information. That is no longer an issue at all (see pp 222–237 of the appeal record). However, he has now repeated this in his prayer for a writ of *quo warranto*.

[18] In addition, our perusal of paras 17–19 of the respondent's affidavit reveals that the respondent was alluding to the 'Lack of Transparency and Certainty as well as inconsistencies relating to the Allocation, the nature and scope of the discretion vested in the Prime Minister'. This averment is not even remotely relevant to a writ of *quo warranto*.

[19] Plainly and obviously, the respondent was not challenging the qualifications and appointments of the DG and the director or any legal flaw in their qualifications and appointments. The respondent's prayer (1) and paras 17–19 of his affidavit are undoubtedly outside the scope of a writ of *quo warranto*. In particular, the respondent has failed to fulfil precondition (3) above.

[20] Our answer to the above question is therefore in the negative.

MANDAMUS

[21] It was contended for the appellants that the respondent's application for leave for 'a Writ of Mandamus' was to compel the appellants to:

(a) disclose information in respect of the projects and activities for which the allocation will be granted; and

(b) grant the respondent's 2010 application.

[22] The appellants cited *Koon Hoi Chow v Pretam Singh* [1972] 1 MLJ 180 HC; and added that:

(a) The respondent has failed to fulfil the conditions contained in s 44 of the Specific Relief Act 1950 ('s 44') in relation to performance of public duties; and

(b) mandamus is inapplicable to the director's exercise of discretion.

[23] On the other hand, the respondent relied on *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1997] 1 MLJ 481; [1997] 1

CLJ 665 (CA), 736 b to 740 i (CLJ), and submitted that:

(a) There is a distinction between 'a Writ of Mandamus' and 'an Order of Mandamus'; and

(b) the requirements of s 44 apply to a writ of mandamus but not to an order of mandamus which the respondent is now seeking.

[24] The question of law which we have to decide herein is:

> In the light of *the discretion to approve and disburse funds* as stated in prayer (1) of the notice of motion, was the learned judge correct in granting leave for an order of mandamus to compel the appellants to specify information in respect of the disbursement of the allocation; and to compel the appellants to grant the respondent's application vide letter dated 9 July 2010?

[25] We find it necessary to correct the expression 'Writ of Mandamus' used by learned senior federal counsel. That expression is a misnomer. In any event, the respondent is not asking for a 'Writ of Mandamus'. He is praying for an order of mandamus. Section 49 of the Specific Relief Act 1950 prohibits the courts from issuing any 'writ of mandamus'. It has in effect abolished such a writ. It provides follows:

> Bar to issue of mandamus
>
> 49 Neither the High Court nor any other court in Malaysia shall hereafter issue any writ of mandamus.

[26] Legally speaking, the former writ of mandamus is now replaced by an order of mandamus.

[27] The law governing the grant or refusal of an order of mandamus is to be gathered from three pieces of legislation. More specifically, the relevant provisions are contained in:

(a) Section 44;

(b) para 1 of the Schedule to the Courts of Judicature Act 1964 ('the Schedule'); and

(c) O 53

(see eg *Hong Leong Equipment*).

[28] Section 44 is housed in Chapter VII ('Enforcement of Public Duties') of the Specific Relief Act 1950. The relevant portion in s 44(1) reads:

Power to order public servants and others to do certain specific acts

44

(1) A Judge may make an order requiring any specific act to be done or forborne, by any person holding a public office …:

Provided that —

(a) an application for such an order be made by some person whose property, …, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act;

(b) such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character, …;

(c) in the opinion of the Judge the doing or forbearing is consonant to right and justice;

(d) the applicant has no other specific and adequate legal remedy; and

(e) the remedy given by the order applied for will be complete.

[29] In an application for an order of mandamus, these five conditions are cumulative. All of them must be satisfied. In *Koon Hoi Chow*, Sharma J enunciated the following principles:

(a) An order under s 44 is in its nature an order of mandamus. It is a peremptory order of the court commanding somebody to do that which it was his clear legal duty to do. The applicant seeking such an order must have a legal right to the performance of such duty by the person against whom the order is sought;

(b) the prerequisites essential to the issue of an order under s 44 or of a mandamus are:

(i) Whether the applicant in the High Court has a clear and specific legal right to the relief sought;

(ii) whether there is a duty imposed by law on the public officer(s);

(iii) whether such duty is of an imperative ministerial character involving no judgment or discretion on the part of the public officer(s); and

(iv) whether the applicant has any remedy, other than by way of mandamus, for the enforcement of the right which has been denied to him.

(c) These are the questions, but only some of the questions, which are necessary to be answered in every application for mandamus. The applicant must show not only that he has a legal right to have the act performed but that the right is so clear and well defined as to be free from

any reasonable controversy. The order cannot issue when the right is doubtful, or is a qualified one or where it depends upon an issue of fact to be determined by the public officer(s).

[30] In the instant appeal, the disbursement of the allocation is entrusted to the DG and/or the director, who would consider each application in accordance with the guidelines for that purpose. This involves an exercise of discretion based on a detailed and comprehensive process of evaluation. The DG and/or the director is not required to approve all and sundry applications for the allocation. The respondent must show, inter alia, that there is a legal or statutory duty on the part of the DG and/or the director as a matter of course to approve his 2010 application. The respondent must establish the existence of a duty of a public nature, the performance of which is imperative and not optional or discretionary. The respondent has failed to do so. The notice of motion is clearly premised on the DG's and/or the director's 'discretion to approve and disburse funds'. There is not an iota of law that the DG and/or the director must do so.

[31] In the circumstances, our answer to the above question is in the negative.

POLICY CONSIDERATIONS AND MANAGEMENT PREROGATIVE

[32] The appellants took the position that the reliefs itemised in the notice of motion are non-reviewable and non-justiciable, because they involve policy considerations and the management prerogative of the DG and/or the director, whose decision involves an exercise of discretion based on a detailed and comprehensive process of evaluation. The appellants referred to:

(a) *R Rama Chandran v The Industrial Court of Malaysia Anor* [1997] 1 MLJ 145 at pp 197–198 (SC);

(b) *Council of Civil Service Unions v Minister for Civil Service* [1994] 3 All ER 935 (HL); and

(c) *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789, 799 (SC).

[33] The stand taken for the respondent is that:

(a) There is no factual support that the notice of motion involves a management prerogative or policy considerations which are non-justiciable;

(b) decisions of the executive that arise from a prerogative or policy are amenable to judicial review; and

(c) the question of whether a management prerogative is amenable to judicial review is to be dealt with at the 'substantial' (sic) motion.

[34] The question of law for our determination herein is:

> Are the reliefs sought by the respondent in the notice of motion matters of policy considerations and management prerogative of the DG and/or the director and therefore non-reviewable and non-justiciable?

[35] In our view, and as implied in the notice of motion, there can be no doubt that the approval and disbursement of the fund involves an exercise of discretion. The DG and/or the director must evaluate the applications for the allocation. These applications can only be decided by the DG and/or the director in line with policy considerations and management prerogative. The factual background did show that the appellants had approved respondent's application amounting to RM1.72m, while other applications are being given consideration. The director has given practical suggestions to the respondent to channel relevant applications to relevant government agencies. In the process of evaluation, the DG and/or the director must comprehensively balance and safeguard the disbursement of the allocation, consistent with government policy and guidelines. Our courts do not possess the knowledge of policy considerations that underlie the decisions pursuant to the DG and/or the director's evaluation. In this regard, the judicial approach is settled. Within our shores, our apex court and in England, the (then) House of Lords have applied concurrent principles, as illustrated below:

(a) Where policy considerations are involved in administrative decisions and courts do not possess knowledge of the policy considerations which underlie such decisions, courts ought not to review the reasoning of the administrative body, with a view to substituting their own opinion on the basis of what they consider to be fair and reasonable on the merits, for to do so would amount to a usurpation of power on the part of the courts: See *R Rama Chandran*, per Edgar Joseph Jr FCJ (as he then was) at p 197 E–F;

(b) there may be cases in which for reasons of eg public policy, it may be wholly inappropriate for the courts to attempt any substitution of views. Unlike the executive, the judiciary is not armed with all the information relevant to such matters. The High Court, in the exercise of its discretionary power, should decline to enter into the merits of a decision involving these policy considerations: see *Kumpulan Perangsang Selangor Bhd*, per Gopal Sri Ram JCA, speaking for the (then) Supreme Court, at p 799;

(c) Lord Diplock has also expressed a similar sentiment in his speech in *Council of Civil Service Unions*, at p 411;

[36] Reverting to the instant appeal, as the issues raised in the notice of motion are issues of policy considerations and management prerogative, we find that the submission presented for the respondent is legally unsustainable. Therefore, we are of the view that the issues raised in the notice of motion are not judicially reviewable, and hence not justiciable.

[37] Our answer to the above question is in the affirmative.

CONCLUSION

[38] On the foregoing grounds, we hold that the learned Judge of the High Court has erred in granting leave for judicial review. We allow this appeal, set aside the order of the High Court and substitute it with an order that the notice of motion be dismissed.

[39] In the exercise of our discretion, we make no order as to costs here and in the court below.

Appeal allowed with no order as to costs in this court and court below.

Reported by Kohila Nesan